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U.S. Department of Homeland Security

Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 I Street, N.W.
Washington, DC 20536

[redacted]

File: [redacted] Office: CALIFORNIA SERVICE CENTER Date: JAN 21 2004

IN RE: Petitioner:
Beneficiary: [redacted]

Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Helen E. Crawford for

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a "manager, customer services." As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter turns, in part, on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. The petition's priority date in this instance is March 1, 2001. The beneficiary's salary as stated on the labor certification is $23.00 per hour or $47,840.00 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE) dated March 17, 2003, the director required additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing to the present. The RFE required the IRS certified printouts of the petitioner's federal income tax returns for 1999, 2000 and 2001 and W-2 forms for the beneficiary from 1998 to the present.

Counsel submitted IRS computer printouts for the petitioner for the years 1999, 2000 and 2001. No W-2 forms for the beneficiary were submitted. With regard to the W-2 forms, counsel's cover letter stated, "These documents were never generated and therefore cannot be provided."

[redacted]

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition.

On appeal, counsel submits additional evidence. The evidence consists of monthly bank statements for the checking account of the petitioner and a letter from a certified public accountant. Counsel argues on his Form I-290B that the RFE of March 17, 2003 did not advise the petitioner that its ability to pay the proffered wage was to be determined on the basis of tax returns alone. Counsel states that the petitioner was not given the opportunity to submit evidence that it has eighteen employees, that it has been in business for twenty-eight years, and that it has always paid its salaries. In his cover letter accompanying the submission of additional evidence counsel argues that the bank statements and the letter from a certified public accountant show that the petitioner had the ability to pay the proffered wage.

In his decision the director relied on the IRS tax transcripts submitted by the petitioner. Those transcripts state that the petitioner's tax year ended on June 30 each year. Therefore the petitioner's tax year 1999 ended on June 30, 1999, its tax year 2000 ended on June 30, 2000, and its tax year 2001 ended on June 30, 2001.

The director found the following. For tax year 1999 the petitioner's Form 1120 tax return showed taxable income of $0.00, or $47,840.00 less than the proffered wage. For tax year 2000 the petitioner's Form 1120 showed taxable income of $12,705.00, or $35,135.00 less than the proffered wage. For tax year 2001 the petitioner's Form 1120 showed taxable income of $8,712.00, or $39,128.00 less than the proffered wage.

The transcripts which the director used as the sources for the above figures do not contain entries for every line on the Form 1120 tax return. Notably absent are line 28, for taxable income before the net operating loss deduction, and line 30, for taxable income after the net operating loss deduction. The transcripts do show line 29a for each year, containing the net operating loss deduction. The director apparently used the figures for net operating loss deduction each year as equivalent to "taxable income." The only year for which the petitioner submitted a copy of its Form 1120 tax return was for the tax year 2001. On that return, line 28 for taxable income before the net operating loss deduction was $8,712, with a net operating loss deduction on line 29a in that same amount of $8,712. The taxable income on line 30 is shown as zero.

For 2001 the director cited the figure of $8,712 as the "taxable income." For the tax year 2001 this figure actually represents taxable income before the net operating loss deduction and special deductions. It appears that for tax years 1999 and 2000 the "taxable income" figures used by the director also reflect taxable income before the net operating loss deduction and special deductions.

The director's decision was correct in finding that for each of the years 1999, 2000 and 2001 the petitioner's taxable income was less than the proffered annual wages. The director should have specified that the taxable income figures used were those before the net operating loss deduction. But that lack of clarity in the director's decision does not render the director's analysis incorrect.

The director did not consider the petitioner's net current assets as potential sources for paying the proffered wage. The IRS transcripts in the record contain incomplete summaries of schedule L, since certain lines on the schedule L do not appear on the transcripts. Presumably the omitted lines are ones for which the entries on the petitioner's tax returns were zero. An analysis of the petitioner's transcripts of its schedule L for 1999, 2000 and 2001 indicates that net current assets for each year were -$11,082, -$6,979, and -$12,398 respectively. Therefore the petitioner's net current assets were not sufficient to cover the proffered wages from the priority date of March 1, 2001 to the present.

Counsel's evidence submitted on appeal includes monthly checking account statements from March 2001 to May 2003. The closing balances on those monthly checking account statements range from a low of $-6,436.81 (overdrawn) for July 31, 2001 to a high of $2,758.93 for March 31, 2001. The ending balance for the last statement was $809.22, for May 31, 2003. These figures do not establish that the petitioner had sufficient resources to pay the proffered annual wages of $47,840.00. Moreover, nothing in the petitioner's evidence indicates that the funds shown on the checking account statements represent additional resources apart from those shown on the petitioner's tax returns.

Counsel also submits on appeal a letter from a certified public accountant. That letter states that the petitioner has been in business for over 60 years and that it has never failed to meet its payroll to any of its employees. The letter also contains revenue projections and calculations of net income, with the assumption of hiring the beneficiary at the proffered wage. The letter states that the petitioner expects to increase its sales by 10% to 20% a year. The accountant's projections show that petitioner's net income would remain positive even with the added expense of the wages of the beneficiary.

The projections in the accountant's letter contain detailed estimates of the various costs associated with the projected increases in revenue. Nonetheless the letter contains insufficient information to establish the basis for the projected increase of sales of 10% to 20% per year. This case is therefore distinguishable from *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), where the petitioner had submitted detailed documentary evidence in support of its projections for an increase in revenue expected upon the hiring of the beneficiary. In the instant case, the letter from the certified public accountant is insufficient evidence to establish the petitioner's ability to pay the proffered wage.

For the foregoing reasons, the additional evidence submitted by the petitioner on appeal does not establish that the decision of the director was incorrect.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.